APPEAL NO. 040647
FILED MAY 11, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on March 3, 2004. The hearing officer determined that the respondent (claimant) has not yet reached maximum medical improvement (MMI), therefore his impairment rating (IR) cannot be determined. The appellant (carrier) appealed, asserting that the hearing officer erred in failing to give presumptive weight to, and adopt, the Texas Workers' Compensation Commission (Commission)-appointed designated doctor's certification that the claimant reached MMI on October 30, 2003, with a 5% IR. The carrier further asserts that the hearing officer erred in basing his decision on exhibits which were excluded from the record. The appeal file does not contain a response from the claimant.

DECISION

Reversed and rendered.

We first address the carrier's assertion that the hearing officer erred in considering documents which were excluded from evidence. Our review of the record indicates that the hearing officer discussed the claimant's treating doctor's November 20, 2003, letter. This document was in fact admitted into evidence and is contained on the first page of Claimant's Exhibit No. 1. The hearing officer did discuss the Report of Medical Evaluation (TWCC-69) signed by the treating doctor, in which he disputes the designated doctor's certification of MMI and IR. This document was in fact excluded from evidence. However, since there was no issue as to whether the claimant properly disputed the designated doctor's certification, any error committed by the hearing officer in considering and discussing this document is deemed to be harmless, especially in light of our decision regarding MMI and IR.

The parties stipulated that the claimant sustained a compensable injury on _____. The record reflects that the claimant underwent a two level annuloplasty intra discal electro thermal (IDET) procedure on September 10, 2003. On October 30, 2003, the designated doctor certified that the claimant was at MMI as of that date with a 5% IR. On November 20, 2003, the claimant's treating doctor wrote a letter indicating his disagreement with the designated doctor's certification both as to MMI and IR. The treating doctor wrote that, due to the claimant's September 10, 2003, IDET procedure, "by definition" the claimant would not be at MMI until six months after the procedure and his discogenic pain would give him a 20-25% IR. The Commission forwarded the treating doctor's letter to the designated doctor by way of a letter of clarification dated November 25, 2003. In his response dated December 4, 2003, the designated doctor stated:

> Under TWCC rules, [MMI] is ***"the earliest date after which, based on a reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated."*** This is interpreted as the time at which no further diminution of the whole body impairment is likely despite further treatments or passage of time, to the best of the examiner's medical certainty. To the best of ***my*** (the designated doctor's) medical certainty, I have determined this to be the case. [Emphasis in original.]

Sections 408.122(c) and 408.125(c) provide that the report of the Commission-appointed designated doctor shall have presumptive weight and the Commission shall base the date of MMI and the IR on that report unless the great weight of the other medical evidence is to the contrary. Whether or not the great weight of the other medical records overcomes the presumption that the designated doctor's certification is correct is a question of fact for the hearing officer to resolve.

The hearing officer determined that the designated doctor's certification of MMI was contrary to the 1989 Act and improper. In so doing, the hearing officer focused on the above-cited language from the designated doctor's response to the Commission's letter of clarification. In the background information section of the decision and order, the hearing officer stated:

> Although part of the designated doctor's definition of MMI is consistent with the definition in the [1989 Act, Section 401.011(30)], his interpretation of that definition is wrong. The MMI certification determination is not contingent upon further diminution of the whole body impairment; rather, it is contingent upon improvement of [c]laimant's medical condition including the impairment. The MMI certification determination is not contingent on "medical certainty"; rather, it is contingent upon reasonable probability that improvement in [c]laimant's medical condition can no longer reasonably be anticipated. Because the designated doctor's certified MMI date was determined based on the designated doctor's misinterpretation of the statutory requirements, that certification is invalid and rejected.

We cannot agree with the hearing officer's assessment that the language contained in the designated doctor's response to the Commission demonstrates that the designated doctor does not understand, or has misinterpreted, the concept of MMI. In fact, his response contains the exact statutory definition of MMI. We have often held in various areas of Texas Workers' Compensation law that "no magic words" are required. It is too great a stretch for us to read the language used by the designated doctor in his response to the Commission, and reach the conclusion that he does not understand such a basic concept as MMI. This is especially so when the response is read in conjunction with the designated doctor's narrative report, which was based upon his physical examination of the claimant. The designated doctor's response could easily be read as stating that he believes that the claimant is as good as he will get, and no further surgical intervention is necessary. We likewise see no significance in the fact

that the designated doctor used the term "medical certainty" as opposed to "reasonable medical probability." We expect the designated doctors in the Texas Workers' Compensation system to be experts in medicine, not legal writing. We find that the designated doctor's response to the Commission, without further evidence, does not demonstrate that the designated doctor misunderstood, or misapplied, the concept of MMI, and as such, the response is not a basis for invalidating his certification as being contrary to the provisions of the 1989 Act.

Finally, we view the claimant's treating doctor's disagreement with the designated doctor's certification of MMI and IR to be a mere difference of medical opinion. The treating doctor's only rationale for his opinion that the claimant was not at MMI at the time of the designated doctor's examination was because "by definition," the claimant would not be at MMI until six months after the IDET procedure. No evidence was submitted to support this opinion, and the designated doctor clearly disagreed, as did a carrier peer review doctor. Additionally, the hearing officer stated that had the designated doctor's date of MMI not been incorrect, his certification of a 5% IR would have been correct.

The hearing officer's decision and order that the claimant has not reached MMI and therefore, his IR cannot be determined is reversed and a new decision is rendered that the claimant reached MMI on October 30, 2003, with a 5% IR as certified by the Commission-appointed designated doctor.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

MR. RUSSELL OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.

_____
Daniel R. Barry
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Margaret L. Turner
Appeals Judge